NO. 83-6500

IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1984

LONNIE JOE DUTTON,

Petitioner,

-v-

STATE OF OKLAHOMA,

Respondent.

WRIT OF CERTIORARI TO
THE OKLAHOMA COURT OF CRIMINAL APPEALS
PETITION FOR WRIT OF CERTOIORARI

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COUNSEL FOR PETITIONER

I.

QUESTIONS PRESENTED

1. Can the death sentence stand under the Fourteenth Amendment to the United States Constitution when the trial court disallowed crucial mitigating evidence in te sentencing phase of the trial?

2. What criteria are used to determine effectiveness of counsel under the sixth Amendment to the United States Consitution?

NO.

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PETITION FOR WRIT OF CERTIORARI TO
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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals entered int his case on the 6th day of January, 1984.

OPINION BELOW

The opinion of the Oklahoma Court of Criminal Appeals was publiished and appears at ___ P.2d ___, 55 O.B.J. 2 (January 14,1984). It is annexed as Appendix A t this petition. The order denying rehearing is unreported. It is annexed as Appendix B to this petition.

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on January 6, 1984. A timely petition for rehearing was denied on January 31, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

This case involves the Fourteenth Amendment to the United States Constitution which provides, in relevant part:

> "...Nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

The Sixth Amendment to the United States Constitution provides in relevant part:

> "In all criminal prosecutions the accused shall enjoy tne right to have a speedy and public trial, by impartial jury of the state and district wherein the crim shall have been committed...; and to have the assistance of counsel for his defense."

This case also involves provisions of the Oklahoma Statutes.

1. 21 O.S. Section 701.7 Murder in the first degree.

   A. A person commits murder in the first degree when he unlawfully and with malice aforethought causes the death of another human being. Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

   B. A person also commits the crime of murder in the first degree when he takes the life of a human being, regardless of malice, in the commission of forcible rape, robbery with a dangerous weapon kidnapping, escape from lawful custody, first degree burglary or first degree arson.

2. 21 O.S. Section 701.9 Punishment for murder.

   A. A person who is convicted of or pleads guilty or nolo contendere to murder in the first degree shall be punished by death or by imprisonment for life.

STATEMENT OF THE CASE

The petitioner, LONNIE JOE DUTTON, was convicted of murder in the first degree in violation of 21 O.S. Section 701.7. He was sentenced to death.

THE EVIDENCE AT TRIAL

Eddie Kiplinger testified at trial that while he, his brother and a friend were at the Cottage Bar in Oklahoma City, Oklahoma, on January 2, 1979, the petitioner entered the tavern. (TR p.210,211)* The petitioner was served a bowl of soup by Wanda Honeycutt, mother of Dale Eugene Gray, the alleged victim. (TR p. 212) Kiplinger and his two (2) companions departed shortly thereafter for a period of five (5) minutes. (TR. p.212) The only persons remaining in the bar were the petitioner, Honeycutt and Gray. (TR p. 212,361)

According to Wanda Honeycutt, the petitioner pulled out a gun and ordered her and her son to lie on the floor behind the bar. (TR. p.362) The petitioner first shot her son and then shot her. (TR. p.363-365)

Kiplinger returned to the tavern and found Honeycutt shot and Gray dead. (TR. p.212) Both Kiplinger and Honeycutt positively identified the petitioner as the man who was in the Cottage Bar and as the man who shot Honeycutt and killed Gray. (TR. p.211,361)

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*TR. denotes the trial transcript filed in the Oklahoma Court of Criminal Appeals.

On January 5, 1979, and on January 11, 1979, petitioner made voluntary statements confessing to the commission of the murder after being read his Miranda warnings. (TR p.273-278) Said confessions were introduced into evidence. (TR p.344-349) The petitioner also told the police officers at the time he made his confessions that the victim's blood stained the coveralls petitioner was wearing and that he discarded these coveralls at another tavern nearby. (TR. p.347-349) These coveralls were later found at the suggested tavern's locale on January 9, 1979. (TR p.279,282)

After the state rested its case, petitioner's trial counsel attempted to call him to testify on his own behalf. The petitioner, however stood mute and failed to testify. (TR p.374-376) Having no other witnesses, the petitioner rested his case.

Based on the state's evidence, the jury found the petitioner guilty of first degree murder. (TR p.411)

During the sentencing phase of the trial, the state first presented its case as to the aggravating circumstances. The state's evidence mainly consisted of testimony allegedly connecting the petitioner with a robbery murder occurring at the Agnew Bar on January 1, 1979, and a robbery at the Spango Bar on January 3, 1979. (TR p. 460-479,444-450)

Petitioner's only other offer of mitigating evidence was the testimony of petitioner's mother, Mrs. Dutton. The trial court disallowed her taking the stand due to her presence in the courtroom throughout the trial proceedings after the Rule of Sequestration had been invoked. (TR p.484)

The jury found that due to the aggravating circumstances the death sentence should be imposed. (TR p.548)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The petitioner alleged on appeal that it was error to impose the death sentence when crucial mitigating evidence was disallowed introduction. The Oklahoma Court of Criminal Appeals held that the failure to consider such evidence resulted in no harm to the petitioner.

2. Petitioner contended on appeal that he was denied effective assistance of counsel under the Sixth Amendment to the United States Constitution. The Oklahoma ourt of Criminal Appeals held that petitioner received reasonably competent assistance of counsel.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER IT WAS FUNDAMENTAL ERROR TO DISALLOW CRITICAL MITIGATING EVIDENCE

In the sentencing stage of petitioner's trial the trial court refused to permit the petitioner's mother to testify in support of mitigation. The trial court disallowed her testimony due to her presence in the courtroom after the Rule of Sequestration had been invoked. Although trial counsel offered no proof as to the context of her testimony, the court can take notice of this plain error as affecting substantial rights. Fisher v. United States, 328 U.S. 463, 90 L.Ed, 1382 (1946).

Because the only other evidence presented in support of the mitigation was a confession to another murder, the mother's testimony would have been crucial to the petitioner's case. The disqualification of the mother as a witness, based on a technicality such as the Rule of Sequestration, denies the petitioner due process of law as is guaranteed him by the Fourteenth Amendment to the United States Constitution.

This Court held in Green v. Georgia, 442 U.S. 96,99 S.Ct. 2150, 60 L.Ed 2d 738 (1979), that to exclude testimony in the punishment phase of the defendant's trial on the grounds that it constituted hearsay was a denial of a fair trial and a violation of the Due Process Clause of the Fourteenth Amendment.

Petitioner argues that excluding critical testimony based on the hearsay rule is similar to excluding critical testimony based on the Rule of Sequestration. To exclude crucial evidence in the sentencing phase of a defendant's trial based on such technicalities is fundamental error and affects substantial rights.

Morever, it is within a trial court's discretion to grant exceptions to the Rule of Sequestration. Eddings v. Oklahoma, 102 S.Ct. 869 (1982).

The Oklahoma Court of Criminal Appeals stated in Flynt v State, Okl. Cr., 216 P.2d 344 (1950):

> "The fact that a witness, who is under a rule, remains in a court-room during the trial does not thereby make her incompetent as a witness; such fact only goes to affect non-credibility as a witness or subjects her to punishment for contempt of court for remaining in the courtroom after the witnesses had been excluded."

Failure to allow mitigating evidence in the sentencing phase of the trial is a violation of the Fourteen Amendment to the United States Constitution. The finding by the Oklahoma Court of Criminal Appeals that the refusal to permit the mother to testify was not an abuse of discretion deprives the petitioner of due process of law. This Court should grant Certiorari in light of the above argument.

II.

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS IS GUARANTEED HIM BY THE SIXTH AMENDMENT TO THE CONSTITUTION

Petitioner was not afforded effective assistance of counsel. His representation has consisted of four (4) different counsel: his first attorney was dismissed due to a potential conflict of counsel; his second counsel represented him at trial but abandoned him on appeal; his third counsel also abandoned him on appeal; his fourth counsel his present lawyer, lodged his appeal after being Court appointed three (3) years after petitioner's trial.

Petitioner contends that he was deied effective assitance of counsel at trial. Oklahoma's standard for effective counsel was established in Johnson v. State Okl. Cr.,620 P.2d 1311 (1980). Oklahoma's standard is reasonbly competent counsel.

Due to petitioner's trial counsel's blatant errors throughout trial, petitioner maintains he was not given reasonably competent counsel.

Some of the errors are as follows:

A. Failure to properly prosecute a change of venue.

Trial counsel did not diligently prosecute his motion for change of venue. Petitioner's co-defendant was granted such a motion. Although there is no record of the hearing, if trial counsel had properly prosecuted the motion, it surely would have been granted. The same pre-trial publicity existed for both defendants.

B. Failure to pursue motions.

Trial counsel's motions were filed the Friday preceding petitioner's trial. These motions, including motins to inspect and produce witnesses were not argued, however, until the morning of trial.

C. Failure to give requested instructions.

Trial counsel failed to give requested instructions. Trial counsel alluded to duress throughout the trial but did not request an instruction on the defense of duress.

D. Reference to petitioner's inability to testify in front of the jury.

Trial counsel repeatedly asked the petitioner to take the witness stand while the petitioner was before the jury. It is fundmental error to refer either directly or indirectly to a defendant's failure to testify. Thorenson v. State, Okl. Cr. 100 P.2d 896 (1940).

E. Failure to excise prejudicial matter from petitioner's statement.

Trial counsel introduced into evidence in the sentencing phase of petitioner's trial a confession to the commission of another murder robbery. Trial counsel was purporting to show the duress petitioner had been under from the co-defendant; however, trial counsel failed to excise any of the prejudicial matter.

F. Failure to preserve the record for improper remarks in the prosecution's closing argument.

The prosecution refered to parole in his closing argument. Trial counsel objected, but after his objection was overruled he failed to move for a mistrial and ask that the jury be admonished. Failure to follow-up on his objection resulted in waiver of the error from the improper remarks.

Petitioner asks that this court grant his Petition for Certiorari because he was denied effectie assistance of counsel as is Constitutionally guaranteed him. Petitioner's trial counsel clearly fell below the reasonably competent standard adopted by Oklahoma.

CONCLUSION

For the reasons stated above, the petitioner requests a writ of certiorari be granted.

Respectfully submitted,

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BY: _____
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, James W. Berry, certify that I mailed a copy of this Petition for Certorari and all accompanying documents to Michael C. Turpen, Attorney General, and Tomilou Gentry Liddell, Assistant Attorney General, State of Oklahoma, Suite 112, State Capital, Oklahoma City, Oklahoma 73105, on this 16th day of March, 1984.

_____
JAMES W. BERRY

APPENDIX A

Opinion of the Oklahoma
Court of Criminal Appeals

United States v. Brignoni-Ponce, 422 U. S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975); *United States v. Ortiz*, 442 U. S. 891, 95 S.Ct. 2585, 45 L.Ed. 2d 623 (1975); *Almeida-Sanchez v. United States*, 413 U. S. 266, 93 S.Ct. 2535, 37 L. Ed. 2d 596 (1973).[1] Accordingly, Judge Williamson properly sustained the appellant's demurrer to the evidence on the basis of Judge Geb's order, at the appellant's trial.

We are furthermore not persuaded to adopt the alternate theory proffered by the State, which theory would sanction the stops on the basis of its police power to provide for the public safety and welfare. The State argues that, if routine and reasonable driver's license checks are permitted to ensure the safety of the citizens of Oklahoma, then roadblocks designed solely to discover and apprehend intoxicated drivers are likewise a legitimate exercise of its power. While we do not categorically reject this argument, we would note that the State's power to conduct routine and reasonable driver's license checks is grounded in 47 O. S. 1981, §6-112. See, *Brantley v. State*, 548 P.2d 675 (Okl. Cr. 1976); *Edwards v. State*, 319 P.2d 1021 (Okl. Cr. 1957). We find no statutory authority which would support, directly or indirectly, the State's contention that it has the power to establish checkpoints to inspect all motorists to discern if any are intoxicated.

The action taken by the district court is AFFIRMED, and the State's appeal hereby DISMISSED.

Appeal upon a Reserved Question of law from the District Court, Oklahoma county; Creston B. Williamson, Judge.

THE STATE OF OKLAHOMA appeals upon a reserved question of law from Oklahoma County District Court, Case No. CRM-81-3994. The order of the District Court sustaining the appellant's demurrer to the evidence is AFFIRMED, and the State's appeal DISMISSED.

Robert H. Macy, Dist. Atty., Larry A. Jones, Asst. Dist. Atty., Dist. No. seven, Oklahoma County, attorneys for appellant.

Ted. A. Richardson, Oklahoma City, attorney for appellee.

CORNISH, J., and
BRETT, J., concur.

1. Cases involving police action similar to the present have recently arisen in other states. See, *Commonwealth v. McGeoghegan*, 449 N.E.2d 349 (Mass. 1983); and *State ex rel. Ekstrom v. Justice Court of State of Arizona*, 663 P.2d 992 (Ariz. 1983). In *McGeoghegan*, the Massachusetts Supreme Court Judicial Court held the roadblock unconstitutional because there was no showing of sufficient police presence at the roadblock, and because of inadequate lighting and warning to oncoming motorists. The Arizona Supreme Court held in *ex rel. Ekstrom* that the police officers conducting the roadblock were given insufficient guidelines to govern the scope and nature of their actions; hence they were afforded an unconstitutional amount of discretion.

LONNIE JOE DUTTON, Appellant, v. THE STATE OF OKLAHOMA, Appellee.

No. F-79-337. January 6, 1984.

CORNISH, J. Lonnie Joe Dutton was convicted by a jury of Murder in the First Degree in the District Court of Oklahoma County.

Dale Eugene Gray, the deceased, was gunned down after being robbed on January 2, 1979, while working in the Cottage Bar in Oklahoma City. His mother, Wanda Honeycutt, was also shot, but recovered and testified at appellant's trial, identifying Dutton. On January 5, and January 11, 1979, appellant admitted to police officers that he shot both victims while his confederate, Carl Sheldon Morgan, waited in the car. He also gave written statements concerning his involvement in another robbery-murder of one Wilma Speaks on January 1, 1979 at the Agnew Bar in Oklahoma City, Oklahoma.

Appellant first assigns as error the trial court's failure to grant pre-trial motion for change of venue. Appellant's confederate, Carl Sheldon Morgan, was granted a change of venue and was tried in Tulsa County. Dutton argues that the publicity was equally damaging for both, and that his motion should have been granted.

We first point out that appellant failed to follow the procedure prescribed by 22 O.S.1971, §561 in presenting his change of venue motion to the trial court. A written and verified petition is not contained in the record, nor were affidavits of credible witnesses submitted. The petition, not being properly before the trial court, is not properly before the appellate Court. *Ake v. State*, 663 P.2d 1 (Okl.Cr.1983).

Appellant had the burden to demonstrate that he could not get a fair trial in Oklahoma County. He

provided no evidence to prove this, but rather relies on the fact that Carl Sheldon Morgan was granted a change of venue supposedly on the basis of adverse pre-trial publicity. Appellant has failed to overcome the presumption that he was able to receive a fair trial. *Hammons v. State*, 560 P.2d 1024 (Okl.Cr.1977). The mere showing of adverse pre-trial publicity will not overcome this presumption especially where an extensive voir dire was allowed, as was done here, to ferret out those juror's who were unable to render a verdict solely upon the evidence presented at trial. *Russell v. State*, 528 P.2d 336 (Okl.Cr.1974). That a change of venue was granted to his accomplice does not necessarily dictate that a change of venue be granted appellant. *See, State ex rel. Young v. Warren*, 536 P.2d 965 (Okl.Cr.1975). The trial judge did not abuse his discretion in denying appellant's motion.

Appellant next assigns as error the trial court's refusal to conduct a competency hearing prior to trial. His attorney states that Dutton made an outburst at trial and refused to assist counsel in his own defense.

Appellant was tried in May of 1979. The controlling statute at that time was 22 O.S.1971, §1162 (now 22 O.S.1981), §1162). It required that a jury be impaneled to determine a criminal defendant's competency to stand trial or to be sentenced when "a doubt arises" as to defendant's present sanity. The doubt referred to in the statute is that in the trial judge's mind after an evaluation of the facts, source of information, and motive. The trial judge's finding is not disturbed on appeal absent a showing of clear abuse of discretion. *Beck v. State*, 626 P.2d 327, 328 (Okl.Cr.1981).

In the present case, the trial judge made a determination that appellant was competent to stand trial based upon his own observations as well as the opinions of two psychiatrists who examined appellant at his attorney's request on the second day of trial. They reported that appellant was simply "scared stiff". Appellant's lack of cooperation with his attorney was due to his fear of the possible consequences if found guilty, as opposed to an inability to observe appellant's conduct during the trial and prior to sentencing. *Reynolds v. State*, 575 P.2d 628 (Okl.Cr.1978). We find that no abuse of discretion occurred.

Appellant next contends that two prospective jurors were improperly dismissed for cause under *Witherspoon v. Illinois*, 391 P.2d 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The veniremen tended to hedge when answering questions by the prosecutor and judge, but ultimately indicated that their views regarding capital punishment would prevent or substantially impair performance of their duties as jurors. Juror Rutherford, when asked if he could decide the issue of guilt without considerng the potential penalties, remarked: "I don't believe I could. I don't believe I could get that off my mind, no." A juror who cannot impartially decide guilt violates his oath, and this is a proper challenge for cause under the directives of *Witherspoon*. *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980). Juror Hopcus remarked, when asked whether she could ever vote to impose the death penalty, "I don't think I could." This juror indicated by her several answers that she was irrevocably committed prior to trial to vote against the death penalty. This is also proper cause to excuse a juror under *Witherspoon*, 391 U.S. at 522, n.21, 88 S.Ct. at 1777, 20 L.Ed.2d at 785; see also *Jones v. State*, 660 P.2d 634 (Okl.Cr.1983).

Appellant assigns as error the admission into evidence of his statements to police officers after he was arrested on January 5, 1979, but prior to his arraignment on January 11, 1979. Appellant urges that the delay in arraigning him was unnecessary and infringed upon his constitutional rights under the Fifth and Fourtheenth Amendments to the United States Constitution, rendering his statements involuntary.

The right to come before a magistrate without unnecessary delay is a statutory (22 O.S.1981, §181), not a federal constitutional right. *Delaney v. Gladden*, 397 F.2d 17 (9th Cir. 1968), *cert. den.*, 393 U.S. 1040, 89 S.Ct. 660, 21 L.Ed.2d 585; *Stidham v. State*, 507 P.2d 1312 (Okl.Cr.1973). The burden is upon the appellant to demonstrate a delay and that he was prejudiced by such delay. *E.g., Stidham*, supra.

> [T]his court has never held that taking a statement or confession of an accused person prior to his arraignment will per se vitiate such statement or confession nor render it inadmissible upon a subsequent trial of the accused.

In re Dare, 370 P.2d 846, 854 (Okl.Cr.1962). In *Dare*, a delay of thirty-three days did not of itself cause prejudice.

Each of appellant's statements were introduced only after the trial judge conducted a *Jackson v. Denno*[1] hearing and found them voluntary. The jury was instructed that they should not consider this

evidence unless they found it to be voluntarily given. Upon a review of the record, we are satisfied that the delay in arraigning appellant did not coerce the admissions.

Appellant next asserts that the trial court, prosecutor, and his own counsel made unconstitutional comments on his refusal to testify. During trial, appellant was not responsive to his appointed counsel unlike prior to trial. Appellant was examined by two psychiatrists and found to be "scared", but competent to stand trial. These doctors advised the trial judge that delaying appellant's trial would only worsen this condition. The trial proceeded, and defense counsel announced during opening statement that appellant would testify. The defense theory was that appellant committed the crimes under duress from his accomplice. Appellant did not respond when called by his attorney to testify. The trial judge immediately called the attorneys and appellant into chambers and there advised appellant of his right to testify or to not testify. He advised appellant that he could be cross-examined about prior felony convictions if he did take the witness stand. The appellant would not respond to the judge. Court was again called into session and defense counsel again called appellant to testify. Appellant did not respond to his attorney's calls and the defense rested, having no further evidence. The trial judge twice ordered the record to show that the "Defendant sits silent" and declines to testify, and once stated that the defense rested, "there being no evidence presented to the jury." During closing arguments, defense counsel remarked that his client was "physically unable" to testify. The prosecutor objected that there was no evidence of that nature, and the judge sustained the objection.

From a review of the record, it is apparent that any error which may have occurred was invited by defendant and his trial counsel. We have previously held that a defendant may not complain of error he has invited, and that reversal canot be predicated upon such error. *Fox v. State*, 524 P.2d 60 (Okl.Cr.1974). See also *Lockett v. Ohio*, 438 U.S. 599, 98 S.Ct. 2954, 57 L.Ed.2d (1978).

The judge's remarks were made simply to clarify for the record what had occurred. Moreover, the objection by the prosecution and the trial judge's ruling did not constitute a comment upon appellant's refusal to testify. *Willis v. State*, 636 P.2d 372 (Okl.Cr.1981).

Appellant implies that he received ineffective assistance of counsel in this regard. A criminal defendant should receive reasonably competent assistance of counsel. *Johnson v. State*, 620 P.2d 1311 (Okl.Cr.1980). However, this does not mandate flawless counsel of counsel judged ineffective by hindsight. *Clark v. Blackburn*, 619 F.2d 431 (5th Cir.1980). See also *Johnson*, 620 P.2d at 1313. We should not now second guess defense counsel's trial strategy. *Id.* We are unable to conclude upon a review of the record that the level of competency fell below the standard required by the law, especially in light of appellant's conduct, which contributed to the alleged error.

As appellant's sixth allegation of error, he asserts that the trial court erred in admitting several photographs of the deceased on the floor of the bar. The pictures depicted the gun shot wound to the head, as well as the position of the body in relation to the room. Appellant complains that the photographs were not accurate since the body, which originally lay face down, had been turned upright, and that they served no other purpose than to inflame the passions of the jury.

We disagree. The jury was made aware that the body had been moved. Furthermore, the photographs were not unduly gruesome and helped the jury to visualize the crime scene, and tended to corroborate the pathologist's testimony of the cause of death. Thus, we find its probative value outweighed any prejudicial effect. *Boutwell v. State*, 659 P.2d 322 (Okl.Cr.1983).

Appellant next assigns as error the trial court's failure to instruct the jury, *sua sponte*, that they could draw no adverse inferences from appellant's refusal to testify. Appellant's authority for such an assignment, *Carter v. Kentucky*, 450 U.S. 288, 305, 101 S.Ct. 1112, 1121, 67 L.Ed.2d 241, 254 (1981), provides:

> The failure to limit the jurors' speculation on the meaning of that silence, *when the defendant makes a timely request that a prophylactic instruction be given*, exacts an impermissible toll on the full and free exercise of the privilege. Accordingly, we hold that a state trial judge has the constitutional obligation, *upon proper request*, to minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify. (Emphasis added.)

The obligation to so instruct does not arise until a proper request is made. We reject appellant's asser-

tion that a trial judge is obligated to give a cautionary instruction on its own initiative. See also *Cole v. State*, 645 P.2d 1025 (Okl.Cr.1982).

Appellant further complains, citing *Sandstrom v. Montana*, 442 U.S. 510 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), that the court's instruction on Murder in the First Degree improperly shifted the burden of proof to appellant to prove that he did not have a deliberate intention to effect the homicide. The portion appellant finds offensive provides: "It will be sufficient proof of such deliberate intention if the circumstances attending the homicide and the conduct of the accused convince you beyond a reasonable doubt of the existence of such deliberate intention at the time of the homicide." *Sandstrom* concerns only presumptions concerning an element of the crime which are mandatory, or shifts the burden to defendant to disprove the element. *Id.* at 524, 99 S.Ct. at 2459, 61 L.Ed.2d at 51. The portion of the instruciton which appellant complains of is neither. Rather, it instructs the jury that they may discern a deliberate intent from circumstantial evidence. This was proper under Oklahoma law. *McFarland v. State*, 648 P.2d 1248 (Okl.Cr.1982).

This Court has previously held that in certain instances it is proper for the trial judge to instruct the jury that it should view identification testimony with caution. *Melot v. State*, 375 P.2d 343 (Okl.Cr.1962). Appellant contends that the trial court erred in failing to so instruct his jury. However, he failed to request such an instruction, and thereby waived any error in this regard. *Luckey v. State*, 529 P.2d 994 (Okl.Cr.1974).

In a capital case, this Court will carefully review the record and consider all matters presented which are supported by the record. *Hathcox v. State*, 94 Okl.Cr. 110, 230 P.2d 927 (1951); *Parish v. State*, 77 Okl.Cr. 436, 142 P.2d 642 (1943). Appellant requested at the beginning of the trial that all witnesses be sequestered. See 12 O.S.1981, §2615. Appellant's mother remained in the courtroom during all of the proceedings. Defense counsel attempted to call her as a witness during the sentencing stage, but, the trial judge refused to permit her to testify. Appellant asserts that this was an abuse of discretion.

We are unable to discern from the record what testimony in mitigation appellant's mother would have presented. The exclusion of evidence is not ground for error unless a party makes a record of the proposed evidence or the proposed evidence is obvious from the context. 12 O.S.1981, §2104(A)(2). Appellant's mother and father testified prior to formal sentencing that appellant had been committed to hospitals on several occasions for treatment of his emotional problems. Each occasion had been precipitated by drug abuse, according to her statements. Assuming that this is the same evidence the mother would have given in mitigation, there was no harm resulting to appellant. There was no claimed defense of insanity or drug intoxication. The hospitalization she described occurred four or five years prior to the alleged crime. This evidence was inconsequential to the defense of duress.

As appellant's final assignment of error, he asserts that he should have received a preliminary hearing on the aggravating circumstances the State intended to prove. We have previously denied such a requirement, and do likewise here. See *Stafford v. State*, 665 P.2d 1205 (Okl.Cr.1983); *Johnson v. State*, 650 P.2d 54 (Okl.Cr.1982).

On review of the record, we find that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. 21 O.S.1981, §701.13(C)(1). We also find that the evidence supports the jury's finding that two aggravating circumstances existed: that the appellant knowingly created the risk of death to more than one person; and, that there existed a probability that the appellant would commit criminal acts of violence that would constitute a continuing threat to society. 21 O.S.1981, §701.12(2) & (7).

By appellant's statements to police officers, he participated in a murder in addition to the killing of the decedent herein, and the shooting of the decedent's mother. His statements also reflected that he was the one who borrowed the gun for the purpose of committing robberies. His claim that he acted out of fear of his accomplice are contradicted by statements in his confession that he never tried to get away from Morgan. Rather, he continued his course of crime, and even performed the task of dividing the loot. There was testimony from Joseph James Seija, another robbery victim of appellant and his accomplice, Morgan, that appellant told Morgan that they should kill their victims. Morgan refused this suggestion. This record sufficiently supports the jury's findings.

We further find that the sentence is not excessive nor disproportionate compared with the penalty imposed in similar cases, considering both the crime and the defendant. 21 O.S.1981, §701.13(C)(3). Comparison has been made with several prior deci-

sions in which the death sentence was affirmed. *Coleman v. State*, 668 P.2d 1126 (Okl.Cr.1983); *Stafford v. State*, 665 P.2d 1205 (Okl.Cr.1983); *Ake v. State*, 663 P.2d 1 (Okl.Cr.1983); *Smith v. State*, 659 P.2d 330 (Okl.Cr.1983); *Parks v. State*, 651 P.2d 686 (Okl.Cr.1982); *Jones v. State*, 648 P.2d 1251 (Okl.Cr.1982); *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980); and *Chaney v. State*, 612 P.2d 269 (Okl.Cr.1980); those reversed or modified *Johnson v. State*, 665 P.2d 815 (Okl.Cr.1983); *Hatch v. State*, 662 P.2d 1377 (Okl.Cr.1983); *Jones v. State*, 660 P.2d 634 (Okl.Cr.1983); *Munn v. State*, 658 P.2d 482 (Okl.Cr.1983); *Driskell v. State*, 659 P.2d 343 (Okl.Cr.1983); *Boutwell v. State*, 659 P.2d 322 (Okl.Cr.1983); *Odum v. State*, 651 P.2d 703 (Okl.Cr.1982); *Brewer v. State*, 650 P.2d 54 (Okl.Cr.1982); *Hall v. State*, 650 P.2d 893 (Okl.Cr.1982); *Burrows v. State*, 640 P.2d 533 (Okl.Cr.1982); *Franks v. State*, 636 P.2d 361 (Okl.Cr.1981); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); and in particular, to those involving murder in the course of robbery. *Johnson v. State*, 665 P.2d 815 (Okl.Cr.1983); *Ake v. State*, 663 P.2d 1 (Okl.Cr.1983); *Smith v. State*, 659 P.2d 330 (Okl.Cr.1983); *Irvin v. State*, 617 P.2d 588 (Okl.Cr.1980); and *Hays v. State*, 617 P.2d 223 (Okl.Cr.1980).

The judgment and sentence of death is AFFIRMED.

Appeal from District Court, Oklahoma County; Harold C. Theus, Dist. Judge.

LONNIE JOE DUTTON, appellant, was convicted of Murder in the First Degree in Oklahoma County, Case No. CRF-79-105. The jury imposed the death penalty from which his appeal was lodged to this Court. Judgment and sentence AFFIRMED.

James W. Berry, James W. "Bill" Berry & Associates, Oklahoma City, attorney for appellant.

Michael C. Turpen, Atty. Gen., Tomilou Gentry Liddell, Asst. Atty. Gen., Oklahoma City, attorneys for appellee.

BUSSEY, P.J.,
BRETT, J., concur.

HOUSTON DON HARRALL, Appellant, v.
THE STATE OF OKLAHOMA, Appellee.

No. F-82-471. January 10, 1984.

CORNISH, J. Houston Don Harrall was convicted by a Payne County jury of Rape in the First Degree, After Former Conviction of a Felony, and was sentenced to eighteen (18) years in prison. On appeal, he presents six propositions of error. We affirm.

I

As his first proposition of error, appellant contends that the uncorroborated testimony of the prosecutrix was improbable, unreliable, contradictory, and impeached, and hence insufficient to support the verdict.

In summary, the prosecutrix testified that she was abducted by appellant at knife point in the early morning hours of September 12, 1981, as she used a telephone booth across the street from her Stillwater residence. He forced her to drive to a dirt road outside of town, where he ordered her to disrobe and raped her. He then drove her around the countryside for an hour and a half as he pondered what to do with her. After repeated vows of silence by the victim, the appellant decided to return her to Stillwater and release her. En route back to town, the appellant expressed remorse, and insisted that the victim accept two twenty dollar bills for her trouble. When she reached safety, the prosecutrix called her boyfriend, who in turn summonded the police. The victim turned over her clothes and the money to the investigators.

The defense claimed that the prosecutrix consented to intercourse. The appellant testified that the complaining witness flagged him down from the phone booth, and agreed to engage in an act of prostitution. On appeal, the appellant challenges the sufficiency of the prosecutrix's testimony, relying upon the color and manner of her dress; the assortment of articles taken by her to the phone booth; her failure to seize opportunities for escape; her often lengthy conversations with the rapist during the ordeal; and her acceptance of the money. However, the prosecutrix offered plausible explanations for these and other features of the case emphasized by the defense, and we conclude that a jury question was presented.[1]

Before the uncorroborated testimony of the complaining witness will be found insufficient, it must

1. 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964)

APPENDIX B

Order of the Oklahoma
Court of Criminal Appeals
Denying Petition for Rehearing

FILED

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

LONNIE JOE DUTTON,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

No. F-79-337

ORDER DENYING PETITION FOR REHEARING
AND DIRECTING MANDATE TO ISSUE FORTHWITH

On January 26, 1984, a petition for rehearing was filed in the above styled and numbered cause and this Court having carefully considered the same finds that the petition for rehearing should be, and hereby is, DENIED, and the Clerk of this Court is directed to issue the MANDATE FORTHWITH.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 31st day of January, 1984.

HEZ J. BUSSEY, PRESIDING JUDGE

TOM R. CORNISH, JUDGE

TOM BRETT, JUDGE

ATTEST:

Clerk

CASE NO. 83-6500

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1984

LONNIE JOE DUTTON, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

ENTRY OF APPEARANCE

COMES NOW, James W. Berry, a duly licensed attorney in the State of Oklahoma, and enters his appearance on behalf of the petitioner, LONNIE JOE DUTTON.

Respectfully submitted,

JAMES W. BILL BERRY & ASSOCIATES

BY: _____
JAMES W. BERRY

COUNSEL FOR PETITIONER

ORIGINAL

CASE NO. 83-6500

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1984

LONNIE JOE DUTTON, Petitioner

v.

THE STATE OF OKLAHOMA, Respondent.

ON WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, LONNIE JOE DUTTON, moves that the Court grant leave for him to proceed in forma pauperis. As grounds for this Motion, the Petitioner would state that he is currently confined in a penal institution and is unable to pay the fees and costs associated with seeking review of this Court. The factual grounds for this Motion are further detailed in the Affidavit of the Petitioner filed herewith.

For the reasons stated, the Petitioner requests that this Motion be granted.

Respectfully submitted,

JAMES W. BILL BERRY & ASSOCIATES

BY: _____
JAMES W. BERRY

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF THE UNITED STATES

LONNIE JOE DUTTON,
Petitioner,
vs.
STATE OF OKLAHOMA,
Respondent.

83-6500

AFFADAVIT IN SUPPORT OF MOTION
TO PROCEED IN FORMA PAUPERIS

I, LONNIE JOE DUTTON, being first duly sworn, state that I am Petitioner in the above entitled case; that in support of my motion to proceed without being required to pay fees, costs, or give security therefore, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefore; that I believe I am entitled to redress.

I was previously granted leave to proceed without costs, on grounds of poverty, during proceedings on this case in the Oklahoma Court of Criminal Appeals.

I further swear that the responses which I have made to the questions below relating to my ability to pay the costs of prosecuting the appeal are true:

1. Are you presently employed?

Answer: No, I am presently in the custody of the Oklahoma Department of Corrections, serving the sentence for which I am petitioning the Court for review. I have been imprisoned since June 7, 1979.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest dividends, or other sources?

Answer: No.

3. Do you own any cash or checking or savings accounts?

Answer: Yes, my institutional account currently contains $ 35,14 .

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

Answer: No.

5. List the persons who are dependent upon ycu for support and state your relationship to these persons.

Answer: None.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

LONNIE JOE DUTTON

STATE OF OKLAHOMA)
) SS:
COUNTY OF PITTSBURG)

Subscribed and sworn to before me on this 2 day of [illegible], 1984.

Notary Public

My Commission expires:

6-25-85